Supreme Court of the United States

..... TERM, 19.....

No. .....

THE BOROUGH OF LITTLE FERRY, a municipal corporation of the State of New Jersey,

Petitioner,

vs.

BERGEN COUNTY SEWER AUTHORITY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

This case presents for consideration a determination by the Supreme Court of the State of New Jersey that an enactment of the New Jersey Legislature R. S. 40:36A-1 *et seq.* (P. 22-36) as amended by Laws of 1950 Ch. 20 (P. 19-21) was not and is not in violation of the Constitution of the State of New Jersey or of the Constitution of the United States. A complete history of this case can be found in the following reported cases: *Bergen County Sewer Authority* v. *Borough of Little Ferry,* 7 N. J. Super. 213; *Bergen County Sewer Authority* v. *Borough of Little Ferry,* 5 N. J. 548; *Bergen County Sewer Authority* v. *Borough of Little Ferry,* 15 N. J. Super. 43; *Sherwood, et al.* v. *Bergen-Hackensack Sanitary Sewer Authority, et al.,* 135

N. J. L. 304. Pursuant to the provisions of the aforementioned statute the Bergen County Sewer Authority was created. Petitioner challenges the validity of the aforesaid statute stating that the highest Court of New Jersey had declared unconstitutional R. S. 58:15A-1 in *Sherwood, et al.* v. *Bergen-Hackensack Sanitary Sewer Authority, et al., supra,* and suggests that what the Supreme Court of New Jersey did in the present case was a direct about face. The record should note that in the *Sherwood* case the Court was concerned with a law which by its terms was limited to a single county and was therefore special legislation prohibited by the New Jersey Constitution. In the instant case the legislation is not concerned with a single county but applies to all populous counties of the State and therefore does not offend Article IV, Sec. 7, Par. 7, and 8 of the Constitution of New Jersey (R. 24-25). The legislation in question recognized and overcame the constitutional objections raised by the *Sherwood* case.

ARGUMENT.

POINT I.

The petitioner is without standing to raise constitutional objections.

The petitioner is a municipal corporation of the State of New Jersey. As such, it cannot assert the claim that it is being deprived of its property without due process by law. This was very definitely held in *Trenton* v. *New Jersey,* 262 U. S. 182, 67 L. Ed. 937. There the United States Supreme Court sustained an assessment made by

the State of New Jersey against the City of Trenton under a law assessing a tax against municipalities or corporations diverting waters for the purpose of a public water supply. The municipality contended that it owned property in its proprietary capacity and that the law violated the 14th amendment.

After pointing out the difficulty of distinguishing between governmental or proprietary functions, Mr. Justice Butler, speaking for the Court said:

> "But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the state in favor of its own municipalities. We hold that the city cannot invoke those provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question".

See also *Newark* v. *New Jersey*, 262 U. S. 192, 67 L. Ed. 943; *Williams* v. *Eggleston*, 170 U. S. 304, 310; 42 L. Ed. 1047, 1049; *Williams* v. *Baltimore*, 289 U. S. 36, 77 L. Ed. 1015; *North Jersey Water Supply Commission* v. *State Water Policy Commission*, 129 N. J. L. 326.

In *City of Pawhuska* v. *Pawhuska Oil & Gas Co., et al.*, 250 U. S. 394, 39 S. Ct. 526, this Court held:

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. For the purpose of executing these powers properly and efficiently they are usually given the power to acquire, hold, and manage personal and real property. The

> number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters nor any law conferring governmental powers or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. Hunter *v.* Pittsburgh, 207 U. S. 161, 178, 52 L. Ed. 151, 159, 28 Sup. Ct. Rep. 40".

This principle was enunciated as far back as *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 4 L. Ed. 629.

Petitioner attempts to avoid the effect of the foregoing decisions by asserting in its brief (p. 14) that the land in question was owned in its private or proprietary capacity. At the same time it admits that the land was being used for garbage disposal and for emergency drainage (p. 1). In petitioner's brief before the New Jersey Supreme Court, Point VI read:

> "R. S. 40:36A-1, *et seq.* (P. L. 1946 Chapter 123), and as now amended, did not, and does not, authorize the Bergen County Sewer Authority to condemn public lands of the Borough of Little Ferry, especially those already in public use".

The complaint filed in this cause specifically alleges that the lands were in public use (R. 2a-41). Petitioner is obviously grasping at straws in the wind seeking to blow hot and cold at the same time by repudiating its former contentions and now arguing the direct opposite of what it argued before the New Jersey Supreme Court.

We respectfully submit such a contention is without foundation in fact and under the above cited cases without basis in law.

POINT II.

The decision of the Supreme Court of New Jersey is not in conflict with any decisions of this honorable Court but is in accord therewith.

The issues before the Supreme Court of New Jersey did not involve any federal questions of substance not theretofore decided by this Honorable Court. The decision was in keeping with the rulings of this Court in *Trenton* v. *New Jersey, Newark* v. *New Jersey, Williams* v. *Eggleston, Williams* v. *Baltimore* and *City of Pawhuska* v. *Pawhuska Oil & Gas Co. ante.*

Petitioner in its brief (p. 4) alleges that the decision of the New Jersey Supreme Court is in conflict with certain New Jersey cases and a decision of a lower Federal Court (p. 4). This is untrue, as an examination of the cases will disclose. However, even if the statement were true it would not entitle the petitioner to Certification under Rule 38 of this Honorable Court. To be able to assert a claim for certification the decision must be in conflict with decisions of this Court. If it be argued that the decision is in conflict with any prior decisions of New Jersey Courts, the decision being that of the highest State Court would necessarily supersede such earlier decisions.

The Appellate Division of the Superior Court of New Jersey in *Borough of Little Ferry* v. *Bergen County Sewer Authority,* 7 N. J. Super. 213, specifically held that the authority had the implied power to condemn lands which

power it possessed independent of the enactment of the laws of 1950, Chapter 20. The Supreme Court of the State of New Jersey did not disagree with this ruling. The question of retroactivity need not, therefore, be considered.

The decision is not in conflict with *Claridge Apartments Co.* v. *C. I. R.* (p. 4), since that case specifically holds that a statute can have a retroactive effect. If retroactivity should be considered the ruling of the New Jersey Supreme Court that P. L. 1950 Ch. 20 was applicable in this case was in keeping with sound legal principles since it is fundamental that the law in effect at the time of the appeal is the law that governs. *Binetti* v. *Swenson*, 3 N. J. Super. 227; *Fusaro* v. *Reid*, 2 N. J. Super. 107; *Rohrs* v. *Zabriskie*, 102 N. J. L. 472; *Phillips* v. *Belleville*, 135 N. J. L. 271; *Westinghouse Electric Corp.* v. *United Electrical &c.*, 139 N. J. Eq. 97. As the New Jersey Supreme Court pointed out, while the condemnation proceedings were instituted prior to the enactment of the 1950 amendment they had not, at the time of the decision by the Supreme Court, been fully terminated (R. 26).

Since there is no substantial federal question involved the petition for certiorari should be denied. *Trenton* v. *New Jersey, supra; Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 390; 70 L. Ed. 641; *Williams* v. *Baltimore, supra; Monahan* v. *Armatage*, 323 U. S. 681, 89 L. Ed. 552; *Minich* v. *City of Sharon*, 341 U. S. 945, 95 L. Ed. 1370; *Baker* v. *Leenhouts*, 341 U. S. 945, 95 L. Ed. 1370.

POINT III.

The Supreme Court of New Jersey having construed a statute of the New Jersey Legislature, that decision is binding on this Honorable Court.

It would appear from a reading of Petitioners Brief that Point IV contradicts Points I, II, III. Under Point I, petitioner argues that it was not given an opportunity to be heard on the creation of the sewer district. Under Point II it asserts that the New Jersey Legislature, its creator, failed to mandatorily include all municipalities within the natural drainage area and under Point III it asserts that the act of the legislature achieves by indirection what petitioner claims the highest court of New Jersey previously said could not be done. Yet under Point IV petitioner concedes that as a political subdivision its powers may be amended, changed or revoked by the State. Since petitioners' powers are so limited and so subject to the control of the will of its creator, by what authority does it urge these objections against the action of its creator? It continuously seeks to claim the protection of the Fourteenth Amendment but as we have already conclusively demonstrated, under the clear cut decisions of this Honorable Court it cannot assert such an objection. Before the New Jersey Supreme Court it asserted that R. S. 40:36A-1 *et seq.* offended the New Jersey Constitution.

All of petitioner's objections were decided adversely to it. It does not urge those objections here. Since the highest Court of the State of New Jersey has decided that the statute in question does not violate any provision of the Constitution of the State of New Jersey, that decision is

binding on this Honorable Court. *U. S.* v. *Burnison,* 339 U. S. 87; 94 L. Ed. 675; *Hunter* v. *Pittsburgh,* 207 U. S. 161; 52 L. Ed. 151; *Douglas* v. *Noble,* 261 U. S. 165; 67 L. Ed. 590; *Hooker* v. *Los Angeles,* 188 U. S. 314, 47 L. Ed. 487; *Everson* v. *Board of Education,* 330 U. S. 1; 91 L. Ed. 711. Indeed petitioner failed to cite a single case wherein this Honorable Court ever sustained, on behalf of a municipality any of the arguments advanced by it.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for Certification be denied.

Respectfully submitted,

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